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Liaison and the Law: Foreign Intelligence Agencies' Activities in the United States

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A student leaves his country, a United States ally infamous for its human rights violations, to attend college in the United States. He socializes with fellow nationals on campus. Discussions center on repression in his homeland, and he joins an anti-regime organization. Through it, he attends meetings, distributes pamphlets, and joins demonstrations. But he soon hears of dissident friends who, upon returning home, are confronted with detailed accounts of their activities in the United States and are imprisoned and tortured. So he withdraws into silence, leaving dissent to the foolhardy. For him, the majesty of the first amendment exists only in government propaganda.

I. INTRODUCTION

In recent years, concern has arisen among people in the United States that certain states "friendly" to the United States engage in activities within this country that are inconsistent with a congenial state of bilateral relations.[1] The most prominent events generating

* Professor of Law, University of Cincinnati College of Law; former Legal Counsel, Senate Foreign Relations Committee. The events discussed or assumed in this article are intended as hypothetical examples of occurrences which may have particular legal consequences. Footnoted references to information available in the public record are intended merely to demonstrate the plausibility of the hypothetical examples given and are not intended to suggest the existence of additional occurrences or facts.

1. *See* STAFF OF SENATE SELECT COMMITTEE OF INTELLIGENCE, 95TH CONG., 2D SESS., ACTIVITIES OF "FRIENDLY" FOREIGN INTELLIGENCE SERVICES IN THE UNITED STATES: A CASE STUDY (Comm. Print 1978) [hereinafter cited as COMMITTEE ON "FRIENDLY" FOREIGN INTELLIGENCE SERVICES]; *Investigation of Korean-American Relations: Hearings Before the Subcommittee on International Organizations of the House Comm. on International Relations*, 95th Cong., 1st & 2d Sess. (1977–1978); SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS OF THE HOUSE COMMITTEE ON INTERNATIONAL RELATIONS, 95TH CONG., 2D. SESS., INVESTIGATION OF KOREAN-AMERICAN RELATIONS (Comm. Print 1978); Glennon, *Investigating Intelligence Activities*, in TETHERED PRESIDENCY 141–52 (T. Franck ed. 1981). No congressional committee has yet engaged in a comprehensive and systematic investigation of the activities of foreign intelligence agencies in the United States, nor of the ramifications of liaison between the United States intelligence community and foreign intelligence agencies. The "Rockefeller Commission" decried the invasion of individual rights in the United States by foreign intelligence agencies, but referred only to the domestic activities of hostile, communist states. Commission on CIA Activities Within the U.S., Report to the President 7–8 (1975).

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such concern have included the assassination of the Chilean diplomat Orlando Letelier, the operations of the Korean Central Intelligence Agency, and the death of an American professor allegedly murdered in Taiwan because of his dissident activities in the United States.[2] Less publicized are charges that foreign intelligence agents have harassed, intimidated, and monitored dissident students and emigres located in the United States.[3] In addition, concern has arisen that certain states less friendly to the United States engage in similar activities. The Libyan government, for example, allegedly supported an assassination attempt in Colorado.[4] It is asserted that elements of the United States intelligence and law enforcement community acquiesced, if not actively cooperated, in some of these activities. Public apprehension has thus arisen that not all residents of the United States are secure in the exercise of their constitutional rights.

This Article explores the international and domestic legal framework applicable to the problem. It identifies weaknesses in the existing legal structure and makes specific proposals for change in administrative practice as well as federal law. The Article argues for a fundamental change in diplomatic policy by contending that the United States cannot support or acquiesce in the systematic imposition of sanctions by foreign governments on United States residents for political activity. In addition, the Article stresses that national security suffers when fundamental constitutional protections are sacrificed for its preservation. The Article concludes that curbing the activities of foreign intelligence services which restrict free speech in the United States would actually strengthen national security.

2. On July 3, 1981, the body of Wen-Chen Chen, a professor at Carnegie-Mellon University in Pittsburgh, Pennsylvania was found at the National Taiwan University, in Taipei. Taiwan security officials said he had committed suicide because he had confessed to anti-government activity and feared imprisonment. An autopsy revealed 13 broken ribs, a broken spine, a broken pelvic bone and internal injuries, and also revealed that he died six and a half hours after being released from interrogation (which, according to Taiwan officials, lasted 13 hours). N.Y. Times, July 21, 1981, at A2, col. 3. *See Hearings on Taiwan Agents in America and the Death of Professor Chen Wen-Chen Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (1981) [*Taiwan Agents in America*]; S. REP. No. 141, 96TH CONG., 1ST SESS. (1979); Cyert, *Death Chills a Campus*, N.Y. Times, Aug. 27, 1981, at A25, col. 1; *Professor Chen Goes Home*, NEWSWEEK, Aug. 3, 1981, at 49.

3. Amnesty International has reported such activities as those of the Iranian secret police agency SAVAK:

> SAVAK's activities extend beyond Iran to all countries which have sizeable Iranian communities. In particular, Iranian students studying abroad are subject to surveillance; Amnesty International (AI) is aware of instances in which students have been arrested and imprisoned upon their return to Iran, presumably because of their participation in political activities while abroad.

Iran, Amnesty International Briefing 2 (Nov. 1976).

This was not the first time that Amnesty International reported coercion of Iranians living abroad by SAVAK. In June 1976, for example, it said that "[t]here has been an identifiable increase in the repression of opposition within Iran and an extension of the activities of SAVAK . . . to states in which Iranians are living abroad, in an attempt to prevent criticism of the Iranian regime." AMNESTY INTERNATIONAL, THE AMNESTY-INTERNATIONAL REPORT, 1 JUNE 1975–31 MAY 1976 (1976). *See also The SAVAK-CIA Connection*, THE NATION, Mar. 1, 1980, at 229–30.

4. N.Y. Times, Dec. 5, 1981, at 1, col. 1; *Gaddafi's Western Gunslingers*, TIME, Nov. 16, 1981, at 33.

Hypothetical

Consider the following hypothetical facts:

The student described above[5] has heard rumors concerning the presence of THRUSH—Tinaria's secret police—in the United States,

5. The hypothetical student might have read the Honolulu Advertiser which has described, in a series of articles, the activities of the Kuomintang Party (KMT) against Taiwanese students studying at the University of Hawaii.

"The spying program was reportedly administered through the KMT's Standing Committee on the Manoa campus, in conjunction with the Taiwanese Consulate. University students were paid 50 dollars for each report on other students suspected of disloyalty to KMT policies; the chairman of the committee received a monthly stipend from the consulate of two to three hundred dollars plus expenses.

KMT agents were asked to report on "personal associations, public or private statements, extracurricular activities or even reading habits" of their targets. Those Taiwanese targeted feared that their passports would not be renewed. Additionally, they feared they would "be interrogated, followed or denied jobs when they return[ed] home . . . . In at least one case, a student's faculty adviser reportedly was visited by the Investigation Bureau in Taiwan in connection with the student's behavior [at the University of Hawaii.]" Their fears were not groundless. In 1968, a student was sentenced to seven years imprisonment when he returned to Taiwan based on his political activities in Hawaii. Miller & Sussman, *Students at UH and EWC Report Taiwan Is Using Spying Pressure*, Honolulu Advertiser, May 30, 1978. For additional details about Chen Yu-hsi, the student imprisoned, see Miller, *Isolated by Pro-Taiwan Students*, Honolulu Advertiser, June 18, 1978. Chen commented that many Taiwanese hesitated to return to their homeland because they knew or suspected that their United States activities were chronicled by the KMT. Honolulu Advertiser, June 20, 1978, at 1.

KMT activities were apparently not limited to the University of Hawaii; rather, they were part of a nationwide surveillance effort. At a minimum, the KMT's spy network encompassed these campuses: Columbia, Cornell, Iowa State University, Massachusetts Institute of Technology (MIT), Princeton, State University of New York, University of California at Berkeley, University of Chicago, University of Florida, University of Minnesota, and University of Wisconsin at Madison. Honolulu Advertiser, May 30, 1978. *See Taiwan Agents in America*, *supra* note 2, at 2.

Local and university newspapers elsewhere described the ubiquitous nature of the KMT network. *See, e.g.*, Adam, *Taiwanese Here Fear Murder*, Michigan Daily, July 9, 1981 (University of Michigan at Ann Arbor) (reporting, among other things, that a former University of Minnesota student was sentenced to fourteen years of prison upon her return to Taiwan); Rhodes, *Students Charge KMT Spying*, Chicago Maroon, May 21, 1976 (University of Chicago); Swislow, *Desperate KMT Losing Legitimacy*, Daily Cardinal, May 21, 1976 (University of Wisconsin at Madison); McNeil, *Taiwanese Spies in U.S. Universities*, Daily Californian, Mar. 15, 1976 (University of California at Berkeley) (reporting that a former University of Wisconsin student was imprisoned for five years when he returned to Taipei to visit his family); Perez, *UF Students Report Spying Pressure*, Gainesville Sun, May 9, 1976 (University of Florida); Panagoulias, *Taiwan 'Informers' May Be on Campus*, Cornell Daily Sun, May 6, 1976, at 1 (Cornell University); McNamee, *Evidence of 'Taiwan Spy Network' Found*, The Tech, May 5, 1976 (M.I.T.); Brown, *Spies Watch U Taiwanese, Discourage Disloyalty*, Minnesota Daily, Apr. 20, 1976; Eisen, *MIT Investigates Spying Charges*, The Tech, Apr. 2, 1976 (MIT).

but has no first-hand knowledge of it. THRUSH is not only present, but quite active. Directed by "case officers"[6] operating under diplomatic cover,[7] THRUSH engages in covert intelligence collection and various specific covert actions.

THRUSH's intelligence collection efforts are targeted primarily at dissident students seen as hostile to the regime.[8] THRUSH gathers its information through a Tinarian network of student informants, who are recruited through cash payments[9] and scholarship assistance.[10]

6. The training of a "case officer", an espionage term describing the key figure in charge of others who collect intelligence, includes "agent assessment, agent recruitment, agent handling, and agent termination." J. SMITH, PORTRAIT OF A COLD WARRIOR, 124–25 (1976).

7. In a 1978 issue, *Time* magazine claimed that 24 per cent of the Soviet diplomats assigned to embassies in Western Europe were KGB agents and that about 35 per cent of the 136 officials stationed at the Soviet Embassy in Washington were KGB staff members. Bittman, *Soviet Bloc 'Disinformation' and Other 'Active Measures'*, in INTELLIGENCE POLICY AND NATIONAL SECURITY 217–18 (R. Pfaltzgraff, Jr., U. Ra'anan & W. Mulberg eds. 1981). *See also Foreign Agents in America--Shady Tactics and Worse*, U.S. NEWS & WORLD REP., July 4, 1977, at 23 (over 400 Soviet officials in the United States identified with the KGB or GRU). Likewise, at one time there were "at least eighteen KCIA agents with diplomatic or consular titles operating out of the Washington embassy or South Korea's several consulates in the United States," moreover, these tallies may have been low. Hanrahan, *Foreign Agents in Our Midst*, THE PROGRESSIVE, Nov. 1977, at 34.

8. In a television interview, the Shah of Iran disclosed that a network of SAVAK agents existed in the United States to check up "on anybody who becomes affiliated with circles, organizations, hostile to my country," including Iranian students. *The Iran File*, 60 Minutes, vol. XII, no. 25 (transcript of television program broadcast Mar. 2, 1980)(on file at Harvard International Law Journal), at 7. The Shah responded affirmatively when asked if SAVAK functioned "with the knowledge and consent of the United States government." *Id.*

A former South Korean ambassador to the United States, Hahm Pyong-Choon, also confirmed KCIA activities in the United States. His caveat—that the KCIA "used goon psychology and tactics . . . but that does not mean it was policy"—was ineffective, at least from his government's viewpoint. Hahm lost his ambassadorial post, and his remarks were characterized as a result of a "misunderstanding." Hanrahan, *supra* note 7, at 32.

9. *See supra* note 5.

10. *See* Marwick, *The Letelier-Moffitt Murder: Foreign Intelligence Agencies at Work in the U.S.*, FIRST PRINCIPLES, Oct. 1976, at 9 (asserting that many SAVAK agents were "Iranian students at American universities who became SAVAK informers as a condition for getting Iranian government scholarships"). *See also* Hanrahan, *supra* note 7, at 35 (student refusing to report on his fellow students at George Washington University lost his scholarship); Sale, *SAVAK Said at Work in Washington: Iranian Secret Police Agents Strike Fear Among Students*, Wash. Post., May 10, 1977, at A1, col. 6 (SAVAK told student to spy or lose his financial assistance after his "political" discussion group with other Iranians had been "penetrated" and his face photographed during a demonstration); *see also* Rose, *The Shah's Secret Police Are Here*, NEW YORK, Sept. 18, 1978, at 48–49.

Not all informants were legitimate students. One Iranian who wished to leave Iran was denied a passport:

> 'I was recruited by SAVAK in Tehran . . . . was arrested in a mosque for taking a leaflet that criticized the Shah. After that, I lost my job. For months I would be fired from a job days after I was hired. No explanation was ever given . . . . They pointed to my record. I was practically penniless. Finally, SAVAK called me in and one of their officers said, "You want to go to America? Good. We will see that you get to America. But you must help us." He told me that I must spy on Iranian students in America. I didn't have a choice.'

The information so gathered is placed in computers in the Embassy and transmitted to THRUSH headquarters in Tinaria.[11] There, specific plans are made to "counter"[12] the more vocal dissidents. Generally, THRUSH awaits their return home, whereupon many are imprisoned and tortured.[13] For the more egregious offenders, however, there is a more immediate response. At a minimum the offenders are told by anonymous callers[14] that if they continue seditious activities, they, or relatives back home, will suffer bodily harm.[15] Frequently, relatives are attacked or imprisoned by THRUSH.[16] In a few cases, the student is killed in the United States, but in a manner suggesting that the death was unconnected to his political beliefs or activities. This minimizes diplomatic repercussions.[17]

Rose, *supra*, at 46.

Generally, such "agents" are asked to join dissident groups, *see* COMMITTEE ON "FRIENDLY" FOREIGN INTELLIGENCE SERVICES, *supra* note 1, at 10, and to report to case officers on the dates and places of meetings, topics discussed, and, most important, their members—names, employment, political philosophy, and activities, *see I Spied For The Shah*, RESISTANCE, Jan. 1977, at 32; Cohen, *SAVAK: From Iran With Fear*, Boston Phoenix, Apr. 26, 1977, at 6.

11. Information compiled on Taiwanese students in the United States was reportedly transmitted to the headquarters of the Taiwan Garrison Command located in Taipei. A "decision to take action against a visiting individual or to call him in for interrogation [upon his return home] depends largely upon a review of his file kept by the TGC." *Taiwan Agents in America*, *supra* note 2, at 9, 12.

12. These plans may include denial of visas to return home, property confiscation, family harassment (parents or siblings not promoted or even fired), and death. *Id.* at 8.

13. According to an American citizen who had lived in Taiwan and been close to Chinese students,

> [s]tudents from Taiwan . . . live a life of paranoia, never being safe to speak openly about their country with others. They always fear the "professional students" and other secret Nationalist agents in university communities who are paid to report back to the government about their speech and actions. They fear that their families may suffer if they say or do the wrong thing, and also that they themselves may be imprisoned or worse when they return home after completing their studies.

Id. at 25–26. *See supra* note 5. Amnesty International reported that dissident Iranian students were arrested and jailed once back in Iran, apparently in retaliation for their political activities while away from home. *Iran*, AMNESTY INTERNATIONAL BRIEFING 2 (November, 1976).

14. *See* Cohen, *supra* note 10.

15. *See infra* notes 17 and 18. *See also* COMMITTEE ON "FRIENDLY" FOREIGN INTELLIGENCE SERVICES, *supra* note 1, at 11–12 (KCIA goals in the United States included plans "to intimidate 'uncooperative' Korean residents in the United States through their families, relatives and close friends in Korea, to silence dissidents and to make silent ones more 'cooperative'") (statement of Lee Jai-Hyon). A dissident Iranian poet living in the United States discovered that his remarks for the entire academic year had come to the attention of SAVAK, as had his niece who was subsequently arrested and tortured. LaVoy, *Foreign Nationals and American Law*, SOCIETY, Nov.–Dec. 1977, at 59.

16. Even death is a possibility. Primitivo Mijares exiled himself in the United States and gave speeches which severely criticized the regime of Ferdinand Marcos. His fifteen year old son was later kidnapped and murdered. Whether the father's activities and the son's murder were related is unclear. N.Y. Times, June 19, 1977, at 11, col. 1.

17. *See* Marwick, *supra* note 10, at 9 ("[t]he most serious allegation to surface thus far against SAVAK operations in the United States is that they were responsible for the mysterious death by 'suicide' of Persian students who have been vigorously anti-Shah"). *See also Taiwan Agents in*

The ultimate sanction, termination, is contemplated only for highly visible and successful anti-state propagandists.[18] The hypothetical student dissident has also heard rumors of various forms of United States support for THRUSH, but again has no first-hand knowledge of this.[19] In fact, the Central Intelligence Agency (CIA) contributed significantly to THRUSH's establishment.[20] THRUSH keeps CIA officials partially informed concerning its activities in the United States, and Federal

America, *supra* note 2, at 27 ("If a professor [Wen-Chen Chen] from a prestigious American university can meet a mysterious death without the cause of death being made clear, no student is safe. Each one who has spoken against the KMT may become a suicide or the victim of an accidental death.").

18. *See* COMMITTEE ON "FRIENDLY" INTELLIGENCE SERVICES, *supra* note 1, at 9–10 (KCIA contemplated using United States criminals to kill the leading South Korean opposition candidate to Park Chung-hee while candidate was visiting in the United States). In our hypothetical example, such persons may include political organizers, lobbyists, broadcasters, *see* Halloran, *Korean Dissidents in Washington Report Threats by Seoul's Agents*, N.Y. Times, May 22, 1977, at 16, col. 2, newspaper publishers, *id.*, and college professors, *see supra* note 2. Because of the planning, expense, and political risk entailed, murder is the covert action least favored; in contrast, bribery, *see* Hanrahan, *supra* note 7, at 33; extortion, *id.* at 33 and Kerr, *The Future of Taiwan*, Honolulu Advertiser, July 1, 1978; burglary, *see* Anderson & Whitten, *U.S. Is Said to Aid Shah's Police*, Wash. Post, Aug. 20, 1977, at B11, col. 3 and Anderson & Whitten, *Iranian Secret Police Dirty Tricks*, Wash. Post, Oct. 29, 1976, at D15, col. 3; and physical harassment and surveillance, can be and are used with great effect. But when circumstances require, THRUSH does not hesitate to assassinate "enemies of the state," including United States citizens, *see, e.g.*, *The Iran File*, *supra* note 8, at 7.

19. Such knowledge is unsettling:

> For years, after all, KCIA agents roamed the United States more or less at will, shadowing their exiles. Korean residents on the West Coast were so intimidated by KCIA reprisals that they refused to inform American police authorities that KCIA agents here were extorting money from them like Mafia goons. Why should these Korean exiles take the risk by talking? After all, who helped set up the Korean Central Intelligence Agency?

T. PLATE & A. DARVI, SECRET POLICE 276 (1981).

20. For an account of the CIA role in the founding and training of the Iranian secret police, SAVAK, see W. SULLIVAN, MISSION TO IRAN 21–22, 95–96 (1981). Although the training provided SAVAK focused primarily on basic police work designed to perfect intelligence and counterintelligence methods, special care was taken to develop expertise "in the analysis of Soviet techniques and, above all, in the detection of sophisticated Soviet electronic espionage." *Id.* at 96. *See also* J. DINGES & S. LANDAU, ASSASSINATION ON EMBASSY ROW (1979) (describing, inter alia, CIA assistance in the founding of the Chilean secret police, DINA).

For two other discussions of CIA training of members of foreign intelligence agencies, see T. POWERS, THE MAN WHO KEPT THE SECRETS 61, 307 (1979)(discussing reports that the CIA trained secret police in Vietnam, Laos and Cambodia); and Anderson, *U.S. Helped Train Amin Henchmen*, Wash. Post, July 12, 1978, at D28, col. 3 (ten Ugandan "henchmen" of Idi Amin were trained by the CIA at a school in Georgetown).

The CIA is not the only intelligence agency reportedly offering training to other intelligence agencies. For example, Israel's MOSSAD helped instruct Iran's SAVAK, while Brazil's DOPS instructed Chile's DINA and Uruguay's DNII. A collaborative intelligence arrangement exists between Chile's DINA, Argentina's SIDE, and Paraguay's Investigaciones. Instances of other intelligence arrangements have been chronicled. T. PLATE & A. DARVI, *supra* note 19, at 59–60.

The International Police Academy (IPA) in Washington was an example of a training facility run by the CIA. Those states taking training at the IPA included Chile, Nicaragua, Panama, Guatemala, Mexico, Brazil, the Philippines, Hong Kong, Belize (then British Honduras), Korea, Paraguay, Peru, Iran, and Uruguay. Agents from these states enrolled in the "Technical Investigation Course" which involved classroom work in Washington and fieldwork at the Border Patrol Academy in Los Fresnos, Texas. Fieldwork lectures were given by CIA agents. *Id.* at 53–56.

Bureau of Investigation (FBI) reports to the CIA fill in most of the gaps. The CIA makes no objection to the continuation of those activities. It fails to transmit to the State Department any particulars of its tacit agreement with THRUSH.[21]

The CIA is fully aware that the information gathered by THRUSH or given to THRUSH by the FBI is used to identify those targeted for "countering,"[22] and the CIA so informs the FBI. Neither United States agency[23] gives this consideration any weight when formulating policy concerning liaison with THRUSH.[24] Each regards its current relationship with THRUSH as rewarding. THRUSH provides intelligence information both from within and without the United States

The IPA was founded by the United States Agency for International Development. Damaging publicity forced the academy to close. The IPA had earned the reputation for being the "School for Torturers," although this was denied by the IPA. *See id.* at 54, 163–64, 347–51 n.7. The United States, however, did not go out of the business of training foreign intelligence agents. Rather, it turned to alternative means. In 1968, the Federal Police Academy, a recipient of United States monies, opened its doors in Brazil to train Chile's DINA agents, who in turn instructed anti-Castro Cubans living in Costa Rica, Guatemala, and Nicaragua. *Id.* at 53–56.

Given that it is quite likely torture was taught, at least informally, at the IPA, it is reasonable to assume that American-acquired torture skills were put to use in the home states of trainees. Furthermore, it follows that other skills, including surveillance and harassment techniques, were employed against citizens in the home state. It is not a quantum leap to posit that dissident emigres from the trainee state living in the United States probably have been subject to those skills.

Other skills taught by the CIA include agent recruitment and handling, physical and electronic surveillance, surreptitious entry, methods of infiltration, and assassination and torture techniques. *See* T. POWERS, *supra*, at 126.

21. CIA failure to notify the State Department would constitute a violation of the Case Act. *See infra* text accompanying notes 49–52. One author has noted, however, that "[f]rom the CIA's point of view the Secretary of State's office was about as secure as the floor of Congress with a full press gallery." T. POWERS, *supra* note 20, at 130.

22. It has been suggested that George Bush, when CIA Director, knew of the DINA operation against Orlando Letelier in the United States, yet chose not to dissuade DINA from its goal. T. PLATE & A. DARVI, *supra* note 19, at 275. However, after the assassination, the FBI conducted so exemplary an investigation that DINA officials were reportedly quite uneasy. *Id. Cf.* Marwick, *supra* note 10, at 5.

23. It has been alleged that the FBI also maintains "liaisons" (a term of art describing "the interchange of intelligence of mutual interest [between] two governments," *see* W. SULLIVAN, *supra* note 20, at 97) with foreign intelligence agencies, primarily for exchange of information and training. The FBI has acknowledged that it maintained a liaison relationship with SAVAK and that it accepted information from SAVAK. In a 1977 letter to the American Civil Liberties Union, FBI Director Clarence K. Kelley wrote that "we have established liaison with SAVAK officers who have contacted our field offices," and that "we accept any information which is volunteered." Letter from Clarence M. Kelley, Director, FBI, to Aryeh Neier, Executive Director, and Jack D. Novik, National Staff Counsel, ACLU (Dec. 23, 1977) (on file with author).

See also Anderson & Whitten, *U.S. Is Said to Aid Shah's Police*, Wash. Post, Aug. 20, 1977, at B11, col. 3 ("An FBI official acknowledged that Mansur Rahzadeh [the principal representative of SAVAK in the United States] was a 'foreign liaison source' of the FBI.").

24. Besides "official" United States foreign policy, other facts may explain why United States agencies fail to restrict the activities of friendly agents. Consider first the personal reaction of United States officials toward foreign dissidents. Because these officials "deal only with the regime in power . . . and actively support that regime against foreign threats and internal

which is important to national security.[25] Furthermore, the CIA and the FBI are aware that if any THRUSH officer is designated as *persona non grata*, or if any other action is taken against THRUSH officers present in the United States, Tinaria will retaliate with sanctions against CIA personnel in Tinaria.[26] Rather than risk disrupting the sensitive relationships of the CIA and the FBI with THRUSH, the State Department does not transmit to Congress any information indicative of a CIA-THRUSH agreement. Indeed, it makes a *pro forma* objection to THRUSH's activities in the United States, but takes no action to bring them to a halt.

II. THE LEGAL FRAMEWORK

The activities of foreign intelligence agencies in the United States and their relationship to agencies of the government of the United States raise a variety of complex legal issues under both international and domestic law.

A. International Law

1. State Responsibility for Injury to Aliens

In the hypothetical described above, the government of Tinaria wrongfully imprisoned and tortured individuals whom it would not have been able to identify but for its surveillance operations within the United States. Did the United States government breach a duty owed Tinarian aliens under international law by failing to take steps to prevent their surveillance?

Under the predominant view[27] a state is responsible under international law, for injury to an alien caused by conduct subject to its jurisdiction, provided that the conduct in question is attributable to the state and wrongful under international law.[28] The term "conduct" includes both acts and omissions[29] attributable to the state. Conduct is wrongful if it (a) departs from the international standard of justice,[30] or (b) constitutes a violation of an international agreement.[31]

Although the "international standard of justice" required is not altogether clear, the State Department has argued that, with respect to injuries caused by private persons, it is the duty of a government to "exercise reasonable care to prevent such injuries."[32] "Due diligence" is the term employed by the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens:[33] "A State not only has a duty to protect aliens . . . it likewise has an obligation to protect aliens in the territory of other States from wrongful acts which may have their origin within territory under its control."[34]

Under the hypothetical, violations of internationally recognized human rights were perpetrated against foreign nationals upon their return to their home state. Those acts had their origin in THRUSH surveillance conducted in the United States.[35] The United States did

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'subversion,' they tend to function according to the simpler rule, 'your enemy is my enemy.'" T. PLATE & A. DARVI, *supra* note 19, at 276 (quoting LaVoy, *supra* note 15, at 63). Also important is the fraternal bond of cooperation between secret police, whether or not that cooperation is "official." "In this atmosphere, even ideological differences of the severest kind can be subsumed to the exigencies of police work. If the FBI must respect the working prerogatives of the CIA—and it must—then by what logic can the FBI intervene in the United States operations of a foreign secret police agency? Especially when the secret police force in question . . . has worked . . . closely with the CIA?" *Id.* at 276–77.

25. When the CIA was compiling information for its Operation CHAOS, it relied in part on data gathered by friendly foreign intelligence services on United States citizens travelling abroad. Through CHAOS, the United States Government opened 13,000 files on approximately 7200 of its own citizens hoping to develop evidence of Communist ties to the anti-war movement of the late 1960's and early 1970's. The fact of cooperation between the CIA and friendly foreign intelligence services was revealed to plaintiffs' attorneys as part of discovery in a civil suit brought against present and former government officials charged with implementation of CHAOS. The names of the cooperating agencies were deleted from the declassified documents, which were not made public. Marro, *C.I.A. Data Indicate Foreign Agents Helped Spy on U.S. Citizens Abroad*, N.Y. Times, Feb. 22, 1977, at 1, col. 3.

26. *See* COMMITTEE ON "FRIENDLY" FOREIGN INTELLIGENCE SERVICES, *supra* note 1, at 3. In the Senate investigation, the extent to which the United States Government should "knowingly permit *any* foreign intelligence officers to conduct operations in the United States" was recognized as a pivotal issue; the committee prefaced its findings by noting that

> [t]he answer to this basic question is in part answered by our own need to conduct intelligence operations abroad. If the United States Government arrests or expels foreign intelligence officers or agents, then it risks foreign retaliation against U.S. intelligence operatives, innocent U.S. citizens, or the foreign policy interests of the United States.

Id.

27. A minority of states take the position that a state need grant only equality of treatment to nationals and non-nationals to fulfill its international obligations. J. BRIERLY, THE LAW OF NATIONS, 278–79 (H. Waldock 6th ed. 1963).

28. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 164 (1965).

29. *Id.*

30. *Id.*

31. *Id.*

32. Letter from the Assistant Legal Adviser for International Claims (English) to John W. Smetana, July 17, 1957 *reprinted in* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 738 (1970).

33. Article 13 states:

> 1. Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterent measures, against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful:
>
> (a) if the act is criminal under the law of the state concerned; or
>
> (b) the act is generally recognized as criminal by the principal legal systems of the world.

Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 13(1), (Draft No. 12, Apr. 15, 1961) (Reporters Sohn and Baxter, Harvard Law School).

34. *Id.* A State may be put on notice of a special duty to protect an alien if there has been violence against him or against groups of aliens or nationals of a particular state . . . or if there have been threats of such violence and criminal conduct." *Id.*

35. *See infra* note 42.

little to prevent those acts of surveillance and, indeed, acquiesced in them.[36]

2. Sovereignty and Police Functions

In the hypothetical, Tinaria's secret police, THRUSH, engaged in covert intelligence collection within the United States by gathering information about dissident students through a network of paid student informants.

Article 2(4) of the United Nations Charter provides that all members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[37] This principle was elaborated upon by the General Assembly in 1970 in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States,[38] which provides that "all . . . forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law."[39]

Pursuant to these general precepts, customary international law proscribes the exercise of sovereign power within the territory of another state without its consent.[40] Police activities are a function of sovereign power. Whether enforcement activities pursued in the territory of another state would necessarily offend the sovereignty of that state is unclear. Under the prevailing view all activities related to law enforcement would offend the sovereignty of the host state.[41] A less restrictive position would proscribe only activities actually illegal under the law of the host state. Under this view, assassination or attempted assassination would constitute exercises of police power in violation of international legal precepts, whereas simply following persons or infiltrating meetings would not.

a. Surveillance Leading to Sanctions

Physical surveillance, in and of itself, harms no one and is not unique to police activity. In the realm of intelligence operations, however, surveillance is infrequently conducted as an end in itself. It is carried out as a means of harassing or intimidating the subject. Furthermore, surveillance provides information for use in "countering" the subject upon her return to her home state, and for acts of retaliation against her relatives.[42] Since surveillance in the United States leads directly to these acts of violence abroad and restricts the exercise of free speech by other nationals of that state living in the United States,[43] such surveillance would seem to interfere with the sovereignty of the United States.

b. The Question of Consent

Police activities conducted in the United States by foreign intelligence agencies are an offense against United States sovereignty unless the United States consents to them. Did the United States in the hypothetical described above consent to the performance of police functions in its territory by THRUSH? Under the hypothetical facts the CIA (and to some extent the FBI) and THRUSH were engaged in a symbiotic relationship. The consequences of this pattern of cooperation, under both international and domestic law, depend in part upon whether it constitutes an agreement.

i. Did An International Agreement Exist?

The International Court of Justice has ruled that a state may be bound legally in some circumstances without an exchange of express

36. *See supra* text accompanying notes 21, 22.

37. U.N. CHARTER art. 2, para. 4.

38. G.A. Res. 2625, 25 U.S. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

39. *Id.* at 123.

40. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., Ser. A., No. 10, at 20 ("the first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state"). *See* Akehurst, *Jurisdiction in International Law* [1972–73], 46 BRIT. Y.B. INT'L L. 145–51. The United States, in a note to the Soviet Embassy in Washington, dated August 19, 1948, stated that "the United States cannot permit the exercise within the United States of the police power of any foreign government." Note from Under Secretary of State Lovett to the Soviet Embassy at Washington (Aug. 19, 1948), *reprinted in* 8 M. WHITEMAN *supra* note 32, 384 (1967). The note was sent in response to the demand of the Soviet Consulate General in New York City for the return of a Soviet citizen who sought asylum in the United States. For a discussion of this incident, see Borchard, *The Kasenkina Case*, 42 AM. J. INT'L L. 858 (1948). For purposes of the "waiver" of sovereign rights it would seem reasonable to view acquiescence as consent.

41. *See* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812). In Nevada v. Hall, 440 U.S. 410, 416–17 (1979), Justice Stevens, writing for the Court, favorably included Chief Justice Marshall's *Schooner Exchange* observation that any exceptions to a state's territorial sovereignty must be traced to the state's consent to the exceptions. *Hall* concerned the refusal of a California court to recognize Nevada's sovereign immunity claim, a refusal upheld by the Court.

42. An Amnesty International report describes Iranian legislation under which Iranians have been held upon their return home:

> [T]he Act for the punishment of persons acting against the security and independence of the state (1931) provides for the punishment of persons "forming or belonging to organizations opposed to the monarchy, or having a collectivist ideology" [and those] "acting against the constitutional monarchy outside Iran." Sentences under these articles range from three years' imprisonment to death. A report in *Kayhan*, Teheran's largest daily newspaper, on 20 August 1975 stated that penalties for some of the above offences were to be increased. In practice this would mean that an Iranian who returned to Iran from abroad could be sentenced to life imprisonment, solely for participation in political activities outside Iran . . . . [O]ute apart from the shortcomings of the legal system . . . this legislation is so loosely interpreted that it can be used to punish even the mildest opposition to the regime.

Amnesty International Briefing, *supra* note 3, at 2.

43. *See infra* text accompanying notes 73–76.

promises.[44] Accordingly, the State Department will examine this possibility when determining what constitutes an agreement.[45] "[A]gency level agreements are international agreements . . . . [T]he fact that an agreement is signed by a particular department or agency of the United States Government is not determinative. Agencies can and do bind the United States Government in international law . . . ."[46] Moreover, the so-called "Rush Letter"[47] requires all government agencies to transmit to the State Department "any agreements of political significance . . . and any that involve continuing or substantial cooperation in the conduct of a particular program or activity . . . including the exchange or receipt of information and its treatment."[48] One may reasonably conclude that the pattern of conduct characterizing the relationship between THRUSH and the CIA, under the hypothetical, implied an international agreement.

ii. The Case Act

Under the hypothetical the CIA did not inform the State Department of any agreement it made with THRUSH. The Case Act[49] provides that:

> The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing) other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than 60 days thereafter.[50]

The parenthetical phrase was added to the Act in 1978.[51] The Senate Foreign Relations Committee explained that the purpose of the amendment was to "require the transmission of intelligence-sharing and intelligence liaison agreements, many of which are oral."[52]

If an international agreement were found to exist, the law would require that the text be transmitted to Congress. In the hypothetical above, no such transmittal occurred.

iii. Liaison Agreements and Human Rights

Under international law, the CIA-THRUSH agreement is probably invalid. First, precepts of the sort set forth in the 1948 Universal Declaration of Human Rights[53] are binding on states as part of customary international law.[54] Acquiescence by the United States government in THRUSH activities in the United States (activities that led to arrest, torture, cruel, inhumane and degrading punishment, and prolonged Tinarian detention without charges or trial) would constitute a violation. If the Universal Declaration of Human Rights is viewed as a legal adjunct to the United Nations Charter, and thus as a binding treaty obligation,[55] article 103 of the Charter would void

44. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457. *See also* Franck, *Word Made Law: The Decision of the ICJ and the Nuclear Test Cases*, 69 Am. J. Int'l L. 612 (1975).

45. State Department Airgram to All Diplomatic Posts Concerning Criteria for Deciding What Constitutes an International Agreement (March 9, 1976), *reprinted in* 1 M. Glennon & T. Franck, United States Foreign Relations Law 14 (1980).

Id. Other criteria are the *significance* of the arrangement; requisite *specificity*, including objective criteria for determining enforceability; *the necessity for two or more parties* to the arrangement; and *form*. There probably were not, in this instance, any "objective criteria for determining enforceability," and the customary form—"style, final clauses, signatures, entry into force dates, etc."—clearly was not used. On the other hand, "[i]f the general content and context reveal an intention to enter into a legally binding relationship, the lack of proper form will not be decisive." *Id.*

46. *Id.*

47. *Id.*, at 339.

48. *Id.*

49. The Case-Zablocki Act, 1 U.S.C. § 1126 (1976 & Supp. III 1979).

50. 1 U.S.C. § 1126 (1976 & Supp. III 1979).

51. Pub. L. No. 95-426, § 708, 92 Stat. 993 (1978).

52. S. Rep. No. 842, 95th Cong., 2d Sess. (1978), *reprinted in* 1 M. Glennon & T. Franck, *supra* note 45, at 177.

Upon passage of the bill by the Senate, the Deputy Director of the CIA, Frank Carlucci, wrote the Chairman of the Senate Foreign Relations Committee to "express the concerns" of the Agency about the provision. Mr. Carlucci continued:

> [I]n terms of intelligence equities, the provisions of section 501 of S. 3076 that relate to oral agreements could have a serious negative impact on intelligence activities conducted pursuant to the Director's authority which may involve, for example, liaison relationships with foreign counterparts. This impact could extend not only to the Director's liability to protect sensitive intelligence information from disclosure, but to our ability in the first instance to maintain certain authorized intelligence relationships, which are dependent on the willingness of foreign entities to deal with us. For these reasons, we would oppose inclusion in legislation of the provisions . . . relating to oral agreements.

Letter from Frank C. Carlucci, Deputy Director of the CIA, to Sen. John Sparkman, Chairman, Senate Foreign Relations Committee (July 7, 1978) *reprinted in* 1 M. Glennon & T. Franck, *supra* note 45, at 185–88.

53. Relevant provisions of the Universal Declaration of Human Rights, G.A. Res. 217A III, U.N. Doc. A/810 (1948), include the right to be free from distinction "made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs" (art. 2); the right to "life, liberty, and the security of person" (art. 3); the right to equality before the law and "without any discrimination to equal protection of the law" (art. 7); the right to an effective remedy for "acts violating the fundamental rights granted . . . by the constitution or by law" (art. 8); the right to "protection of the law" against "arbitrary interference with . . . privacy, family, home, or correspondence" (art. 12); the right to "seek and to enjoy in other countries asylum from persecution" (art. 14); the right to "hold opinions without interference and to seek, receive, and impart information and ideas" (art. 19); and the right to "freedom of peaceable assembly and association" (art. 20).

54. *See, e.g.*, Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (separate opinion of Judge Ammoun); Montreal Statement of the Assembly For Human Rights (1968), *reprinted in* 9 J. Int'l Comm. Jur. No. 1, 94, 95 (1968); Declaration of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, U.N. Doc. A/CONF 32/41 (1968); R. Lillich & F. Newman, International Human Rights: Problems of Law 7 (1979).

55. *See infra* notes 156–60 and accompanying text.

the CIA-THRUSH agreement.[56] Second, the minority view has held that fundamental human rights are not only customary law but also peremptory norms.[57] If so, these norms would void any agreement which derogated from them.[58] Third, for the reasons discussed below, the Executive may not have the constitutional authority to enter into such an agreement.[59] International law could invalidate any agreement beyond the scope of the Executive's constitutional authority.[60]

B. Constitutional Law

In the hypothetical described above, the CIA and the FBI contributed significantly to the establishment and maintenance of Tinaria's secret police.[61] Whether the President was constitutionally empowered to carry out the hypothetical intelligence agreement in question depends upon which of two alternative modes of analysis is used: either (1) by applying a "fixed powers" test in which the foreign relations power of the Chief Executive is weighed against the rights of those affected by the agreement; or (2) by applying the "fluctuating powers" test outlined by Justice Robert Jackson's concurring opinion in *Youngstown Sheet and Steel Co. v. Sawyer* [62] (the *Steel Seizure Case*).

1. The "Fixed Powers" Test

The "fixed powers" test weighs the inherent powers of the President against any constitutional limitations on the exercise of those powers.

56. Article 103 of the charter provides, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

57. E. Suy, *Le Droit des traits et les droits de l'homme*, Inaugural Lecture of the Eleventh Study Session of the International Institute of Human Rights, Strasbourg, France (June 30, 1980).

58. The Vienna Convention on the Law of Treaties, art. 53, Exec. L., 92nd Cong., 1st Sess. (1970). Since an international agreement can be oral as well as written (*see supra* note 52 and accompanying text), there seems little reason to insist that an agreement be in writing for purposes of the *jus cogens* doctrine, but insufficient precedent exists to form any pattern of custom and practice.

59. *See generally infra* text accompanying notes 150–166.

60. Article 46 of the Vienna Convention on the Law of Treaties, *supra* note 58, provides as follows:

> 1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that provision was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

61. *See supra* notes 20, 25, and accompanying text.

62. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

a. The Foreign Relations Power of the President

The courts have seldom ruled upon the President's power to conduct the foreign relations of the United States. Perhaps the most oft-cited opinion concerning the scope of that power is that of the Supreme Court in *United States v. Curtiss-Wright Export Corporation*:[63]

> [W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .[64]

Moreover, Justice Sutherland asserted that this power "did not depend upon the affirmative grants of the Constitution."[65] Acting pursuant to his "inherent" foreign affairs power, the President has entered into numerous "sole" executive agreements,[66] and the Supreme Court has upheld his authority to do so.[67] An intelligence liaison agreement made by agents of the executive branch would constitute an exercise of this inherent power.

The question then becomes whether that agreement is prohibited by the limits placed by the Constitution on the exercise of the foreign affairs power. The first amendment guarantees of free expression are the most likely restrictions. While first amendment rights in general are not absolute, they should provide a counterbalance to the Executive's freedom to enter into international agreements.

b. The First Amendment Rights of THRUSH's "Targets"

Resident aliens stand on essentially the same footing as citizens under the Bill of Rights,[68] and it seems clear that under the hypo-

63. 299 U.S. 304 (1926).

64. *Id.* at 319–20.

65. 299 U.S. at 316–18.

66. *See generally* E. CORWIN, THE PRESIDENT, OFFICE, AND POWERS 3 (4th ed. 1957); McDougal & Lans, *Treaties and Congressional Executive Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945); *Congressional Oversight of Executive Agreements. Hearings on S. 3475 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 92d Cong., 2d Sess. (1972); *Congressional Review of International Agreements. Hearings Before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations*, 94th Cong., 2nd Sess. (1976).

67. Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

68. Bridges v. Wixon, 326 U.S. 135, 148 (1945); Bridges v. California, 314 U.S. 252 (1941); Truax v. Raich, 239 U.S. 33 (1915); United States v. Wong Quing Wong, 94 F. 2d 832 (D. Vt. 1899); United States v. Toscanino, 500 F. 2d 267 (2d Cir. 1974). *See generally* L.

thetical THRUSH's surveillance would have violated their rights to free speech and peaceable assembly.

When trying to vindicate these rights, resident aliens need standing to sue. The Supreme Court ruled in *Laird v. Tatum*[69] that plaintiffs, subjects of domestic surveillance by the United States Army, lacked standing. The Court held that they had not suffered the requisite injury-in-fact.[70] The Court found that plaintiffs had not satisfied the "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action . . . ."[71] Standing is not conferred, the Court said, by a claim "that the exercise of . . . First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity . . . ."[72] "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."[73]

The facts of *Laird* differ from the hypothetical case of aliens under THRUSH surveillance in the United States. In the hypothetical, foreign dissidents faced "a threat of specific future harm," namely, retaliation by Tinaria upon their return home. Such retaliation was based upon information gathered by THRUSH through surveillance in the United States. Hence Tinarian dissidents were "in danger of sustaining a direct injury as a result of" that surveillance.[74] Unlike the army in *Laird*, the Tinarian government did more than simply gather data, it acted upon that data.

There is little doubt that THRUSH surveillance in the United States had a chilling effect upon the exercise of first amendment rights. It is not necessary to establish a nexus between the exercise of protected activities and the application of sanctions. The Supreme Court has stated that activities protected by the first amendment are vulnerable and must be protected from the threat of sanctions almost as much as from the actual application of sanctions.[75] Professor Emerson, discussing the "serious first amendment issues" raised by intelligence collection, has argued that it "should be held a violation of First Amendment rights per se."[76]

HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 254–55 (1972); M. WHITEMAN, *supra* note 32, at 383.

69. 408 U.S. 1 (1972).

70. *Id.* at 13 (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937)).

71. *Id.*

72. *Id.* at 10.

73. *Id.* at 13–14.

74. *See supra* note 2.

75. New York Times v. Sullivan, 376 U.S. 254, 271 (1964).

The rights in question are protected only from the actions of governmental entities. The Bill of Rights does not concern the action of private individuals (or foreign states). However, the involvement of the United States government in the activities of an alleged wrongdoer may constitute state action and otherwise private conduct subject to constitutional limitations.

Courts determine whether state action exists on a case-by-case basis. The facts are crucial. There is a need to show some involvement by the state or of someone acting under color of its authority. The Supreme Court held in *United States v. Guest*[77] that state involvement need not be "either exclusive or direct." The Court stated that "[i]n a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several cooperative forces leading to the constitutional violation."[78]

One such case was *United States v. Price*,[79] in which the Supreme Court found that the state action requirement was fulfilled when private individuals and state officials participated in "joint activity" culminating in the murder of three civil rights workers. The Court stated:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[80]

Commenting on such cases, the authors of one treatise conclude: "[i]t would appear that any significant encouragement of alleged wrongdoers to impair important rights of the aggrieved parties will be sufficient. Even though the complained of practice may not have

76. Remarks of Professor Emerson at the First Symposium of the Allard K. Lowenstein International Human Rights Law Project, Yale Law School (April 16–18, 1982)(on file at Harvard International Law Journal). *See also* White v. Davis, 13 Cal. 2d 757, 773, 533 P. 2d 222, 232, 120 Cal. Rptr. 94, 104 (1975) (en banc) (holding that police undercover operations on university campus directed at no illegal activity constituted a *prima facie* violation of first amendment rights).

77. 383 U.S. 745 (1966).

78. *Id.* at 756.

79. 383 U.S. 787 (1966).

80. *Id.* at 794.

resulted from the encouragement, the actions of the private wrongdoer will be subjected to constitutional limitations."[81]

Analyzing other relevant cases, the authors proceed to discuss situations in which state action was found because the alleged wrongdoer and the government were involved in a "symbiotic relationship." It would seem that in the hypothetical the CIA and THRUSH entered into a symbiotic relationship, in fact, an executive agreement implicating the United States government and rendering it liable to suit by foreign dissidents.

How do first amendment rights fare against executive agreements which would limit their exercise? The Court has never upheld an international agreement, treaty, or executive agreement whose execution it found to impinge upon constitutionally protected activities.[82]

In *Dames and Moore v. Regan*,[83] the Court expressly declined to address petitioners' contention that the suspension of claims, if authorized, would have constituted a taking of property in violation of the fifth amendment.[84] For that matter, the Court has never ruled that power to conclude executive agreements is inherent in the President, but has upheld agreements ancillary to specific plenary powers or statutory authority. In *United States v. Pink*[85] and *United States v. Belmont*,[86] the agreements upheld related to a settlement of claims effected not pursuant to a power inhering in the presidency but incident to the President's exclusive power of recognition.[87] In *Dames and Moore*,[88] the President's authority flowed not from inherent power but from specific[89] and implicit[90] statutory grants.[91]

Summarizing the case law, Professor Henkin has written that "[a]lthough the First Amendment provides that 'Congress shall make no law' abridging freedom of speech, press, religion, assembly or petition, these are equally safe from infringement by treaty, Executive agreement or action, or Court order."[92] Neither of the two foreign

81. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 461 (1978).
82. *See infra* text accompanying note 111.
83. 453 U.S. 654 (1981).
84. *Id.* at 688–89.
85. 315 U.S. 203 (1942).
86. 301 U.S. 324 (1937).
87. *See also* Goldwater v. Carter, 444 U.S. 996, 1006 (1979) (Brennan, J., concurring).
88. Dames & Moore v. Regan, 453 U.S. 654 (1981).
89. *Id.* at 675.
90. *Id.* at 680.
91. "[T]he President's action in nullifying the attachments and ordering the transfer of assets," the Court said, "was taken pursuant to specific congressional authorization [under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06 (1976 & Supp. III 1979)]." *Id.* at 674.
92. L. HENKIN, *supra* note 68, at 254.

relations cases recently handed down, in which protected freedoms were at issue, contradicts that statement.[93]

In *Snepp v. United States*,[94] the non-disclosure contract at issue was found to constitute a waiver of plaintiff's first amendment rights, thus making unnecessary an examination of constitutional issues.[95] *Haig v. Agee*,[96] on the other hand, appears to suggest that the power of Congress and the Executive acting jointly may suffice to override first amendment rights when activities abroad "are causing or are likely to cause serious damage to the national security or foreign policy of the United States."[97] The Court upheld the statutory authority of the Secretary of State to revoke the respondent's passport. A close reading of the case, however, reveals that its rule is inapposite. Some courts have held that the freedom to travel internationally flows in part from the first amendment [98] and is grounded primarily on the due process clause of the fifth amendment,[99] which admits greater governmental limitation.[100] As the Court said in *Zemel v. Rusk*,[101] the fact that a "liberty cannot be inhibited without due process of law does not mean it can under no circumstances be inhibited."[102] That the Court continued to view international travel as a "liberty" flowing principally from the due process clause is clear from its opinion in *Agee*: "the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' the Court has held, can be regulated within the bounds of due process."[103]

Whatever the source of the "right" to travel internationally, the Court has never found that the Executive has no inherent power to restrain that right. Chief Justice Warren, writing for the Court in *Zemel*, and Chief Justice Burger, writing for the Court in *Agee*, each reviewed relevant legislation and found that the passport revocations in question were authorized by statute. The Court noted in *Agee* that

93. *See infra* notes 96 and 98.
94. 444 U.S. 507 (1980).
95. The entire first amendment issue is relegated to a footnote. *Id.* at 509 n.3. For a critique of the Court's anemic reasoning, see Franck & Eisen, *Balancing National Security and Free Speech*, 14 N.Y.U. J. INT'L L. & POL. 339 (1982).
96. 453 U.S. 280 (1981).
97. *Id.* at 282.
98. In Aptheker v. Secretary of State, 378 U.S. 500, 516–17 (1964), the Court regarded freedom of travel as falling within the liberty guaranteed by the due process clause, but also as "a constitutional liberty closely related to rights of free speech and association."
99. N. DORSEN, P. BENDER, & B. NEUBORNE, 1 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 894–95 (4th ed. 1976).
100. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.
101. 381 U.S. 1 (1964).
102. *Id.* at 14.
103. 453 U.S. 280, 307 (1981) (quoting Califano v. Aznavorian, 439 U.S. 170, 176 (1978)).

it had "no occasion in this case to determine the scope of the 'very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.'"[104] Similarly, Justice Douglas in *Kent v. Dulles*[105] expressly "did not reach the question of constitutionality"[106] but instead found that Congress had not authorized revocation under the circumstances of that case.[107] One remaining passport case, *Aptheker v. Secretary of State*,[108] also overturned the Executive's revocation because of an absence of statutory authorization.[109]

The Supreme Court's refusal to subordinate first amendment guarantees to the President's foreign affairs power is sensible. Restraints on free expression undermine governmental legitimacy because they make governmental policy less reflective of the popular will. In an era when the "marketplace of ideas" is increasingly electronic, this is particularly true of inhibitions affecting public assembly. Professor Emerson has stated:

> The public assembly, in whatever form, is an indispensable feature of our system of freedom of expression because it does not depend upon the mass media of communication, which are controlled by the Establishment . . . . [It] brings the speaker face to face with his audience; it provides a dramatic setting in which to communicate an idea . . . . [It] is a cornerstone of the democratic process.[110]

For reasons such as these the Court has declined to diminish first amendment protections when confronted by claims of presidential foreign affairs power. Prior restraints of speech were forcefully condemned in the one case in which the Supreme Court faced the issue squarely in a foreign relations context, *New York Times Co. v. United States*.[111]

Such is the process, pursuant to a "fixed powers" mode of analysis, of assessing the validity of executive action under specific facts. The textual grant of power is identified, limitations (if any) found in the Constitution are applied, the resulting scope is determined through reference to judicial pronouncements and applied to the facts, and a conclusion is drawn. While the "fixed" analytical framework has the advantage of predictability, its weakness is that it accords statutory approval or disapproval an uncertain role; it assumes, within a given factual context, an unvarying reach of executive constitutional authority regardless of congressional enactments. Would the "sole organ" formula of *Curtiss-Wright*, for example, apply irrespective of action taken by Congress?

104. 453 U.S. at 289 n.17 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).
105. 357 U.S. 116 (1958).
106. *Id.*
107. *Id.* at 128.
108. 378 U.S. 500 (1964).
109. The Court held § 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1976), unconstitutional on its face, because it was overbroad and thus violated due process. *Id.* at 505.
110. Emerson, *The Right to Protest*, in THE RIGHTS OF AMERICANS 208–09 (N. Dorsen ed. 1970).
111. 403 U.S. 713 (1971).

c. Application to the CIA-THRUSH Agreement

In the hypothetical described above, the CIA's symbiotic relationship with THRUSH would permit, if not encourage, the Tinarian secret police to violate the first amendment rights of Tinarian nationals and some United States citizens. Simply stated, the issue is whether the foreign relations power of the president should prevail over the rights guaranteed under the first amendment.

First, the symbiotic relationship between the CIA and THRUSH is sufficient to establish state action. Further, the foreign dissidents in the United States did face "a threat of specific future harm." They were in danger of being "countered" upon their return home (or in the United States) as a direct result of surveillance in the United States. The resident aliens therefore have standing to seek the protection of the courts against unconstitutional executive action. One may reasonably conclude that in light of the present posture of the Supreme Court, the rights of resident aliens should prevail.

2. The "Fluctuating Powers" Test

a. Jackson's *Steel Seizure* analysis

Justice Jackson wrote that government under the Constitution does not and cannot "conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."[112] "Presidential powers are not fixed but fluctuate . . . ."[113] A situation involving the assertion of presidential power, he theorized, thus falls into one of three categories:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . .
> 2. When the President acts in absence of either a Congressional

112. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).
113. *Id.*

> grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority . . . .
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .[114]

The fluctuating powers analysis is not without flaws. It is, as Justice Jackson acknowledged, "somewhat over-simplified."[115] Moreover, Justice Rehnquist is doubtless correct in the observation that "executive action in any particular instance falls, not neatly into one of three pigeonholes, but rather at some point along a spectrum."[116]

More important, the analysis does not avoid the principal weakness of the "fixed powers" approach: the "fluctuating powers" analysis requires an assignment of value to the executive power at issue, and another assignment of value to whatever legislative power that was exercised. The threshold question in each of the three categories necessarily remains the scope of the President's "own independent powers."[117]

A final defect in Jackson's analysis is that, while its structure does take account of statutory provisions that may affect executive power, at no stage does it provide for the consideration of constitutional provisions affecting the President's power, those specifically set forth in the Bill of Rights. While the fluctuating powers analysis provides a useful tool for weighing assertions of executive power against those of the legislative branch, its practical utility is limited when the situation is further complicated by express constitutional limitations.

One is not altogether convinced, therefore, by Justice Rehnquist's assertion that the Jackson approach "brings together as much combination of analysis and common sense as there is in this area."[118] Nonetheless, its tripartite framework is helpful in considering congressional intent with respect to issues such as the CIA-THRUSH arrangement found in the hypothetical.

114. *Id.* at 635–38.
115. 343 U.S. at 635.
116. Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).
117. 343 U.S. at 637. In the dispute between the Senate Foreign Relations Committee and the Justice Department in 1979 concerning the treaty termination issue, the question of application of the fluctuating powers test involved essentially the scope of presidential power. *See* S. REP. No. 7, 96th Cong., 1st Sess. 19 (1979); S. REP. No. 119, 96th Cong., 1st Sess. 6 (1979); *cf.* letter from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, to Frank Church, Chairman, Senate Foreign Relations Committee (undated), *reprinted in Treaty Termination: Hearings on S. Res. 15 Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1979).
118. 453 U.S. at 661.

b. Congressional Will

Under the fluctuating powers analysis, the second category[119] is inapplicable since Congress has not left the field open. While disagreement may arise as to what form congressional will has actually taken, there seems little ground for arguing that a failure by Congress to legislate has "invited"[120] independent presidential action. The following review of congressional statutes indicates that Congress has not remained silent. Several treaties which have been the subject of congressional consideration, some ratified by the Senate, are also examined.

The activities of the CIA are governed by the National Security Act of 1947.[121] Congress has enacted three statutes requiring the registration of foreign agencies operating in the United States.[122] Congress has further enacted statutes imposing both criminal and civil liability for the deprivation of the rights of inhabitants of the United States. These statutes reveal the will of Congress with respect to CIA liaisons with foreign intelligence agencies and the activities of such agencies in the United States.

i. Criminal Liability Under 18 U.S.C. 242

Section 242 of title 18, United States Code, provides:

> Whoever, under color of any law willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States shall be fined not more than "$1,000 or imprisoned not more than one year, or both . . . .[123]

Section 242 protects the rights of resident aliens because its coverage is framed in terms of "inhabitants." Moreover, no doubt exists that 18 U.S.C. § 242 applies to actions of federal officials. Unlike one of its civil analogues, 42 U.S.C. § 1983, section 242 is not confined to

119. *See supra* note 114 and accompanying text.
120. In his concurring opinion, Justice Jackson wrote:
> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

343 U.S. at 637.
122. 22 U.S.C. §§ 611–21 (1976).
123. 18 U.S.C. § 242 (1976).

acts performed under color of state law, and private persons acting in concert with federal officials are deemed to act under color of law.[124]

As discussed above,[125] it is clear that aliens residing in the United States are entitled to basic constitutional protection. The use of the phrase "inhabitant" in section 242, rather than the more restrictive term "citizen" used in section 241, coupled with the Supreme Court's recognition that resident aliens are entitled to constitutional protection to render section 242 applicable to actions by federal officials who violate an alien's first amendment rights.

A more serious obstacle to the application of 18 U.S.C. § 242 is the requirement that the defendant acted willfully. In *Screws v. United States*,[126] the Supreme Court ruled that to sustain a conviction under section 242, the prosecution must prove that the defendant intentionally acted to deprive the victim of a constitutional right. To act "willfully," the Court held in *Screws*, is to act "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite."[127]

In the cases following *Screws*, however, some uncertainty has arisen as to whether the "intent" requirement under section 241 is subjective or objective. A minority of courts have ruled that a defendant in a section 241 prosecution must subjectively intend to violate his victim's rights.[128] The majority of courts have recognized, however, that a defendant may be presumed to intend the probable and foreseeable consequences of his actions.[129] Most courts have ruled that the intentional commission of an act which a defendant knows or should know is violative of a victim's constitutional rights will provide the basis for a section 241 prosecution. They have further declined to hold that a defendant's good faith belief in the legality of the action constitutes a defense.[130]

Under the hypothetical, CIA officials who trained THRUSH agents and were on notice that THRUSH was likely to use its newly acquired skills in violation of United States law exposed themselves to liability as facilitators under section 242.[131] Knowledge by the target of unlawful government activity is not a precondition to a section 242 conviction.[132] Section 242 would also impose liability on THRUSH agents.

124. United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966). *See supra* text accompanying note 122.

125. *See supra* note 68.

126. 225 U.S. 91 (1945).

127. *Id.* at 105.

128. *See, e.g.*, United States v. Shafer, 384 F. Supp. 496 (N.D. Ohio 1974).

129. *See, e.g.*, Koehler v. United States, 189 F.2d 711 (5th Cir. 1951).

130. *See, e.g.*, United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976); United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

131. The Department of Justice has never been enthusiastic about proceeding criminally against federal violators of these statutes, even in the case of clear-cut violations. An interdepartmental committee appointed by Attorney General Saxbe in January, 1974 to look at COINTELPRO activities reached the following conclusion:

> While as a matter of pure legal theory it is arguable that these programs resulted in Section 241 violations, it is the view of the committee that any decision as to whether prosecution should be undertaken must also take into account several other important factors which bear upon the events in question. These factors are: first, the historical context in which the programs were conceived and executed by the Bureau in response to public and even Congressional demands for action to neutralize the self-proclaimed revolutionary aims and violence-prone activities of extremist groups which posed a threat to the peace and tranquility of our cities in the mid and late sixties; second, the fact that each of the COINTELPRO programs was personally approved and supported by the late Director of the FBI; and third, the fact that the interferences with First Amendment rights resulting from individual implemented program actions were insubstantial. Under these circumstances, it is the view of the committee that the opening of a criminal investigation of these matters is not warranted.

REPORT OF THE SUBCOMM. ON SECRECY AND DISCLOSURE, Supplementary Detailed Staff Report on Intelligence Activities and the Rights of Americans, Book III, *infra* note 179, at 74.

132. United States v. Liddy, 542 F.2d 76 (D.C. Cir. 1976).

ii. Civil Liability Under 42 U.S.C. 1985(3)

Section 1985(3) of title 42, United States Code, provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege as a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . ."[133]

Enacted in 1871, this statute provides a cause of action against activity which interferes with fourteenth amendment rights. Traditional tort liability standards apply.[134] A defendant is liable for the natural and probable consequences of his actions.[135] Proof is required by a preponderance of the evidence rather than proof beyond a reasonable doubt.[136] The Supreme Court has held that section 1985(3) requires a "class-

133. 42 U.S.C. § 1985(3) (1976).

134. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1982); Owen v. City of Independence, 445 U.S. 662, 635 (1980); Carey v. Piphus, 435 U.S. 247, 257-59 (1978); Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

135. Monroe v. Pape, 365 U.S. 167, 187 (1961).

136. Gamble v. University of Minnesota, 639 F.2d 452, 455 (8th Cir. 1981).

based, invidiously discriminatory animus" behind the action. Courts have found "victim classes" in many groups analogous to that of foreign student dissidents. These include supporters of a given candidate,[138] environmentalists,[139] striking teachers,[140] student members of a political organization,[141] and dissenting union members.[142]

iii. The Alien Tort Claims Act

Section 1350 of title 28, United States Code, confers original jurisdiction on the federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[143] The Alien Tort Claims Act (the "Act") removes the diversity bar operating against emigres by allowing them to sue alien defendants. Although the courts have construed the Act's reference to the "law of nations" as requiring a finding of some impact on United States foreign relations,[144] the Act appears to open the doors of the federal courts to private actions challenging violations of rights recognized by international law.[145] Jurisdiction under section 1350 would extend to violations of the sort discussed above.[146]

137. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

138. Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971).

139. Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975), *vacated as moot*, 507 F.2d 215 (5th Cir. 1975).

140. Bradley v. Clegg, 403 F. Supp. 830 (E.D. Wis. 1975).

141. Brown v. Villanova Univ., 378 F. Supp. 342 (E.D. Pa. 1974).

142. Local No. 1, International Brotherhood of Teamsters v. International Brotherhood of Teamsters, 419 F. Supp. 263 (E.D. Pa. 1976).

It is worth noting that civil remedies could also include a *Bivens* cause of action. The claim takes its name from Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), in which the Court upheld an action for damages for an invasion of constitutionally protected rights even though the Congress had not expressly authorized a particular remedy. *Bivens* itself involved an action for damages arising under the fourth amendment, and it was not immediately clear whether actions based upon other constitutional provisions would also be recognized by the Court. In Davis v. Passman, 442 U.S. 228 (1979), and Carlson v. Green, 446 U.S. 14 (1980), however, the Court appeared to hold that most if not all of the Constitution's substantive provisions will support a private action for damages. But unlike section 242, a *Bivens* action apparently will be subject to good faith defenses. Butz v. Economou, 438 U.S. 478 (1978); G.M. Leasing Co. v. United States, 629 U.S. 338 (1977).

143. The Alien Tort Claims Act, 28 U.S.C. § 1350 (1976).

144. *See, e.g.*, Valange v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. pa. 1966).

145. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), a United States District Court was found to have validly exercised subject matter jurisdiction in an action under section 1350 between two Paraguayan nationals for wrongful death by torture contrary to international law. *See* Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L. L.J. 53 (1981); Conn, *The Alien Tort Statute: International Law as the Rule of Decision*, 49 FORDHAM L. REV. 874 (1981).

146. *See supra* text accompanying notes 143–45.

As to the possibility that a defense of sovereign immunity might be raised either by the United States or by a private party defendant, the Foreign Sovereign Immunities Act provides that

a foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or ommission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1605(a)(5) (1976). The Act was construed in 1980 as providing no immunity to the Government of Chile in a wrongful death action brought by the widow and widower of Orlando Letelier and Ronni Moffitt. Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

147. *See, e.g.*, Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948.

148. Iran, art. II, para. 2, 8 U.S.T. 899, T.I.A.S. No. 3853. Nearly identical language is found in United States treaties with Luxembourg, art. II, para. 4, 14 U.S.T. 251, T.I.A.S. No. 5306; Belgium, art. II, para. 4, 14 U.S.T. 1284, T.I.A.S. No. 5432; Netherlands, art. II, para. 3, 8 U.S.T. 2043, T.I.A.S. No. 3942; Japan, art. I, para. 2., 4 U.S.T. 2063, T.I.A.S. No. 2863; and Israel, art. II, para. 2, 5 U.S.T. 550, T.I.A.S. No. 2948.

149. Japan, art. II, para 1, 4 U.S.T. 2063, T.I.A.S. No. 2863. Likewise, similar provisions are stated in United States treaties with Luxembourg, art. III, para. 1, 14 U.S.T. 251, T.I.A.S. No. 5306; Belgium, art. III, para. 1, 14 U.S.T. 1284, T.I.A.S. No. 5432; Netherlands, art. VI, para. 1, 8 U.S.T. 2043, T.I.A.S. No. 3942; Iran, art. II, para. 4, 8 U.S.T. 899, T.I.A.S. No. 3853; and Israel, art. III, para. 1, 5 U.S.T. 550, T.I.A.S. No. 2948.

150. Luxembourg, art. IV, para. 2, 14 U.S.T. 251, T.I.A.S. No. 5306. Again, comparable guarantees are part of United States treaties with Belgium, art. IV, para. 2, 14 U.S.T. 1284, T.I.A.S. No. 5432, Netherlands art. VI, para. 3, 8 U.S.T. 2043, T.I.A.S. No. 3942, Iran, art. IV, para. 1, 8 U.S.T. 899, T.I.A.S. No. 3853; Japan, art. V, para. 1, 4 U.S.T. 2063, T.I.A.S. No. 2863; and Israel, art. III, para. 4, 5 U.S.T. 550, T.I.A.S. No. 2948.

151. Belgium, art. VI, para. 7, 14 U.S.T. 1284, T.I.A.S. No. 5432. Similarly, these rights also are not accorded in United States treaties with Luxembourg, art. VI, para. 4, 14 U.S.T. 251, T.I.A.S. No. 5306; Iran, art. XX, para. 2, 8 U.S.T. 899, T.I.A.S. No. 3853; and Israel, art. VIII, para. 3, 5, U.S.T. 550, T.I.A.S. No. 2948.

provisions. The first amendment would provide foreign nationals with rights that are coextensive with free speech and association. The violation of these rights would also lead to breaches of the treaties. The Alien Tort Claims Act would also afford a remedy to foreign nationals if the violation of their rights was tortious.[152]

v. The United Nations Charter

The United Nations Charter contains a number of provisions relating to human rights. Article 1 of the United Nations Charter was intended to provide international co-operation in solving international problems of an "economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[153] Article 55 provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[154] All members of the United Nations commit themselves, moreover, to "fulfill in good faith the obligations assumed by them in accordance with the present charter."[155]

152. *See supra* notes 143–46 and accompanying text.

Subject matter jurisdiction has been granted sparingly under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1976), and typically only those cases deciding a violation of the "law of nations" may be heard. Traditionally, the phrase "in violation of the law of nations" has been construed to mean "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealing inter se." Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (footnote omitted). The argument that certain "universally recognized" torts qualify under the jurisdictional requirement of section 1350 is usually unsuccessful. Cohen v. Hartman, 634 F.2d 318 (5th Cir. 1981) (conversion of property); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) (stealing); Abiodun v. Martin Oil Service, Inc., 475 F.2d 142 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973) (fraud); Trans-Continental Inv. Corp. v. Bank of the Commonwealth, 500 F. Supp. 565 (C.D. Cal. 1980) (fraud). *But see* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (section 1350 jurisdiction found in an action between two Paraguayan nationals for wrongful death by torture contrary to international law); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (5th Cir. 1975) (although not relied on by the court, unlawful removal of Vietnamese children by an INS "babylift" might fall under section 1350 jurisdiction); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (smuggling a Lebanese child into the United States on an Iraqi passport for the purpose of avoiding a Lebanese child custody law amounted to a tort and action was cognizable under section 1350).

However, even if, as in *Trans-Continental*, a district court conditioned its grant of jurisdiction on a requirement that the controversy implicate a treaty, those foreign nationals covered by a treaty of friendship, commerce, and navigation ought at least be able to meet the jurisdictional requirement of the federal court.

153. U.N. CHARTER, art. 1, para. 3.

154. *Id.*, art. 55(c).

155. *Id.*, art. 2, para. 2. *See, e.g.*, Wright, *National Courts and Human Rights—the Fujii Case*, 45 AM. J. INT'L L. 62, 73 (1951); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 147–49 (1950); P. JESSUP, A MODERN LAW OF NATIONS—AN INTRODUCTION 91 (1948). This is, in any event, the prevailing scholarly opinion, and it now is the interpretation accorded the above provisions by the International Court of Justice. Advisory Opinion on the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16 (1971).

States which are parties to the Charter have undertaken legal obligations with respect to human rights. The scope of those obligations, and specifically, the extent to which they correspond to provisions of the Universal Declaration of Human Rights,[156] is less clear. However, the Declaration appears to comprise not only a part of customary international law,[157] but also an authoritative interpretation of the Charter's human rights provisions. Indeed, the non-governmental Assembly for Human Rights declared in 1968, in the Montreal Statement, that the Universal Declaration "defines in important detail the 'human rights and fundamental freedoms' which Members of the United Nations have in the Charter bound themselves to respect and protect."[158] Later that year, in Teheran, the International Conference on Human Rights (sponsored by the United Nations) stated that the Declaration "constitutes an obligation for members of the international community."[159]

Under United States law, if the Declaration of Human Rights is viewed as a binding interpretation of treaty obligations undertaken in the United Nations Charter, courts may use it to inform their judgment concerning questions of applicable law.[160] For purposes of determining Congress's will, it is clear that one should consider the Declaration in conjunction with the human rights provisions of the Charter. These provisions provide a moral standard by which to condemn the activities carried out in the hypothetical by THRUSH with CIA acquiescence.

vi. The International Covenant on Civil and Political Rights

Numerous provisions of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") [161] which entered into force on March 23, 1976, relate to the conduct set forth above.[162]

156. *See supra* note 53.

157. *Id.*

158. Montreal Statement of the Assembly for Human Rights, March 22–77, 1968 in 9 J. INT'L COMMISSION JURISTS 94, 94–95 (1968).

159. Proclamation of Teheran, 23 U.N. GAOR, U.N. Doc. A/Conf. 32/41 (1968).

160. Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); Filartia v. Pena-Irala, 630 F.2d 876, 881–85 (2d Cir. 1980).

161. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

162. These include the right not to be "subjected to arbitrary or unlawful interference with . . . privacy, family, home or correspondence . . . ." (art. 17); the right "to hold opinions without interference . . . the right to freedom of expression [which] shall include freedom to seek, receive and impart information and ideas of all kinds . . . ." (art. 19); the right of "peaceful assembly" (art. 21); and the right "to freedom of association with others . . . ." (art. 22). *Id.* at 52–53.

While the United States has not ratified the Covenant, it became a signatory on October 5, 1977. International law requires that a signatory state refrain from acts which would defeat the object and purpose of a treaty.[163] Under the hypothetical, United States support of and acquiescence in THRUSH"s activities in the United States would defeat the purpose of the Covenant.

c. Application to CIA-THRUSH Agreement

The foregoing has reviewed the actions taken by Congress to express its will. The CIA's support of THRUSH in its activities in the United States, as found in the hypothetical, is clearly incompatible with that will. The hypothetical CIA-THRUSH relationship would be legal only if it disabled "Congress from acting upon the subject."[164] "Presidential claims to a power at once so conclusive and preclusive must be scrutinized [under Jackson's analysis] with caution, for what is at stake is the equilibrium of our constitutional system."[165] The "appropriate conclusion," stated by Professor Corwin in analyzing the *Steel Seizure Case*, applies here as well: Congress having entered the field its ascertainable intention supplies the law of the case.[166]

III. TOWARDS A SOLUTION

However clear Congress's intent, that intent has not been carried out. From January 1, 1970, to January 1, 1979, according to the Justice Department, not a single registration took place under 50 U.S.C. § 851, nor did the Justice Department ever bring a prosecution under that section. No prosecution was commenced under 18 U.S.C. § 951 (eight notifications were filed under that provision during that period) except to reinforce espionage cases.

A. Reasons For the Non-Enforcement of Existing Statutes

Enforcement of the registration statutes has failed to occur for a number of reasons. The statutes are overbroad, the Executive lacks

163. Article 18, Vienna Convention on the Law of Treaties, *supra* note 58.

164. Justice Jackson wrote:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (Jackson, J., concurring).

165. *Id.*

166. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 64–66 (1953).

the will to enforce them, and they are subject to two alternative problems of proof: either (1) they require that the foreign agents report themselves (which is unlikely); or (2) the evidence necessary to establish the existence and operation of foreign intelligence agents is apt to come from human intelligence sources protected by the Executive for reasons of national security.

B. Difficulties With the Intentional Tort Remedy

The proof problem is, in addition, the principal weakness in the proposal for an "international tort of emigre repression."[167] Proof of an agency relationship, a nexus between the foreign intelligence service and the individual wrongdoer, is necessarily an element of the tort: "[the] delict occurs when the political emigre is threatened with or suffers damage to himself or family caused by the activities in the United States of foreign agents, particularly when perpetrated to stifle expression of political views."[168]

1. The Proof Problem

Victims of threatening telephone calls, muggings,and hit-and-run accidents are seldom able to identify their assailants. Often, in fact, the targets do not even realize they are targets. This is particularly true where intelligence techniques such as infiltration and surveillance are employed, but it also is true of more direct invasions. As a result of this lack of awareness on the part of victims, it is not surprising that the National Association of Foreign Student Advisers could conduct a study concluding that no such activity was evident on college campuses.[169]

Assuming that her rights were violated, the emigre confronts the virtually insurmountable problem of establishing a relationship between the assailant and a foreign intelligence agency. Few agents or foreign states would volunteer evidence of such a relationship. In addition, various immunities would preclude its compulsion.[170] For-

167. Garvey, *Repression of the Political Emigre--The Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78 (1980).

168. *Id.* at 106.

169. "Though reports have been received for years," its inquiry concluded, "to date no university has been able to conclusively prove the existence of [a surveillance system to keep tabs on its students] . . . . [W]hether for determining institutional policy or for advising complaining parties on available legal recourse, the chief problem facing foreign student advisers in this area is that almost no real evidence of spying or student harrassment is available for submission either in prosecution, or in defense of an accessing party who might be challenged in a libel suit." NAFSA *Newsletter*, March 1977, at 7.

170. *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 64–93 (1965).

eign agents do on occasion "leave tracks and 'blow cover';"[171] evidence similar to that set forth in the hypothetical "can be found by those with incentive to discover it."[172] But only the United States intelligence and law enforcement community has the costly, sophisticated, and extensive intelligence sources and methods necessary to develop such evidence.

2. The "State Secret" Privilege

In passing upon requests by private litigants for such information the courts have shown great deference to the executive branch when it invokes the "state secret" privilege. The seminal case is *United States v. Reynolds*.[173] The widows of civilian passengers brought an action for damages under the Federal Tort claims act, following the crash of an aircraft on a secret mission.[174] In the course of the suit the plaintiffs sought discovery of the Air Force's investigative report. Reversing a lower court order which directed the government to produce the report, the Supreme Court stated:

> It may be possible to satisfy the court from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case [and] the occasion for the privilege is appropriate, then the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[175]

Similarly, in *Chicago & Southern Airline v. Waterman Steamship Corp.*,[176] the Court declared that the "President has available intelligence sources whose reports are not and ought not to be published to the world."[177] Lower courts, accordingly, are receptive to the assertion of the "state secret" exception. In *Mackin v. Zuchert*,[178] which involved a suit between two private parties, investigative reports of the Air Force were held privileged on grounds of national security.

Various sources suggest that in order to resolve privileged claims, the courts should use in camera pre-trial proceedings.[179] In some instances a court may rule, pursuant to such a proceeding, that a legitimate state secret is not involved, or that the need for the information in litigation outweighs requirements of confidentiality. These are indeed rare instances, particularly if the Executive asserts that disclosure would compromise sensitive intelligence sources and methods. Absent extraordinary circumstances, few courts would substitute their judgment for that of the Executive.

According to a study conducted by the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence,[180] 30 "leak" cases were referred to the Department of Justice by the intelligence agencies, and not one was investigated because of a refusal on the part of the agencies to commit themselves "to declassify any and all information in question"which was viewed as required by the Justice Department.[181] Espionage cases "are taken much more seriously,"[182] but the same tension exists, with the result being that "the decision . . . [is] often not to prosecute."[183] "[E]ven if the decision is to proceed to trial in an espionage case," the study found, "it is often a painful and hotly contested matter causing friction between the Justice Department and the intelligence community from the Grand Jury proceedings through sentencing."[184]

C. Difficulties with the "Solarz Amendment"

On December 29, 1981, the Congress enacted an amendment to the Arms Export Control Act[185] which provides:

> Sec. 6. Foreign Intimidation and Harassment of Individuals in the United States.—No letters of offer may be issued, no credits or guarantees may be extended, and no export licenses may be issued under this Act with respect to any country determined by the President to be engaged in a consistent pattern of acts of intimidation or harassment directed against individuals in the United States. The President shall report any such determination promptly to the Speaker of the House of Representatives and to the Chairman of the Committee on Foreign Relations of the Senate.[186]

171. Garvey, *supra* note 167, at 111.
172. *Id.*
173. 341 U.S. 1 (1952).
174. *Id.* at 3–4.
175. *Id.* at 10.
176. 333 U.S. 103 (1948).
177. *Id.* at 111.
178. 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).
179. *See, e.g.*, STAFF OF SENATE SELECT COMM. ON INTELLIGENCE, 95TH CONG., 2D SESS., REPORT OF THE SUBCOMMITTEE ON SECRECY AND DISCLOSURE: NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE 32 (Comm. Print 1978) (relating to criminal prosecutions) [hereinafter cited as REPORT OF THE SUBCOMM. ON SECRECY AND DISCLOSURE]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 207 (1978). *See also* Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982).
180. REPORT OF THE SUBCOMM. ON SECRECY AND DISCLOSURE, *supra* note 179, at 32.
181. *Id.*, at 8.
182. *Id.*
183. *Id.*
184. *Id.*
185. 22 U.S.C.A. §§ 2751–94 (West 1979 & Supp. 1982).
186. 22 U.S.C.A. § 2756 (West Supp. 1982).

The amendment, sponsored by Representative Stephen J. Solarz, was occasioned by the death of Professor Wen-chen Chen.[187] It has the obvious virtue of providing a strong disincentive to state-sponsored harassment and intimidation of United States residents. But the manner in which that penalty, the cut-off of arms sales, is formulated poses serious problems. First, the imposition of the cut-off is discretionary. If a state engages in a "consistent pattern of acts of intimidation or harassment," there is no requirement that the President make that determination; the provision requires merely that, if he does make the determination, he transmit it promptly to Congress. Better drafting would have shifted the burden by requiring that the President, as a condition precedent to making arms sales, certify that no such acts are occurring.

Second, because the amendment fails to include surveillance among the prohibited acts, it would not prevent acts of harassment and intimidation on foreign soil resulting from surveillance conducted in the United States.[188] Indeed, Tinaria, the state in the hypothetical, might continue THRUSH's most significant United States operations without change, simply by ensuring that its targets return home before engaging in retaliatory actions. Third, the amendment is useful only with respect to states which buy arms from the United States and have no other source to which they can turn. The Solarz amendment, while clearly a step in the right direction, is unlikely to improve the lives of foreign emigres in the United States.

D. Proposed Remedies

As the discussion above suggests, past efforts at reform have been minimal and largely misdirected. In order to curb foreign secret police operations in the United States, administrative and statutory changes are needed. Steps such as the following could provide a start:

1. Administrative Reform

Strengthening the statutory framework, although desirable in a number of respects,[189] would accomplish little in the absence of a genuine executive branch commitment to keep foreign agents from harassing United States residents. A resolute will to enforce the law is imperative. It must comprehend measures that ensure effective interaction between the State Department, the CIA, and the Justice Department.

187. *See supra* note 2.
188. *See supra* note 2.
189. *See infra* note 204.

a. *United States intelligence and law enforcement agencies should be prohibited from encouraging foreign intelligence agents to engage in illegal activities in the United States.*

President Reagan promulgated an Executive Order on December 5, 1981, which provides that "[n]o agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order."[190] The Reagan order does not prohibit the CIA or the FBI from directly encouraging foreign intelligence agencies to conduct activities from which they themselves are barred by the order. It precludes the United States agencies only from participating in or requesting the performance of those activities.

An executive order has the force and effect of law,[191] in that it is legally binding upon regulated executive personnel, however the President can unilaterally amend or repeal such an order. There is in addition no requirement to disclose the amendment to the public.[192] Finally, the Reagan order provides more limited protection for resident aliens than for United States citizens, even though resident aliens face a greater peril.[193]

b. *United States intelligence and law enforcement agencies should work together to enforce the registration statutes.*

The unique value of the information available through intelligence operations conducted abroad means that a concerted effort by a strong CIA is essential to any solution.

Congress or the President should specifically instruct the CIA to gather intelligence of use to the Justice Department in identifying foreign agents who operate in the United States. The Justice Department should, in turn, pursue an aggressive enforcement policy, which would mean, among other things, breaking the FBI's fixation on the activities of the intelligence services of communist states,[194] and di-

190. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (1981).
191. Legal Aid Society of Alameda County v. Brennan, 381 F. Supp. 125, 130 (N.D. Cal. 1974).
192. For example, the prohibition in the Reagan order against assassination, section 2.11, could legally be countermanded by the President with a direct order to conduct an assassination. The President could justify this reversal by invoking the same legal and national security considerations on which he based the initial order. He could also rely on national security considerations to require secrecy. *See generally* Note, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 668 (1972) (analyzing scope of presidential power to issue executive orders).
193. Civiletti, *Intelligence Gathering and the Law: Conflict or Compatibility?*, 48 FORDHAM L. REV. 883, 894 n.61 (analyzing differences in the protection accorded United States persons versus foreign nationals under a similar order made by President Carter).
194. "The intelligence community amasses data on all the world's countries, but the primary

recting the FBI to focus on the threat posed by the services of non-communist powers. Accordingly, Congress should increase the FBI's manpower to meet its additional responsibilities.

c. *The United States government should expel foreign diplomats who engage in illegal activities as intelligence officers.*

The legal means are already at hand to do precisely that. Under the Vienna Convention on Diplomatic Relations of April 18, 1961,[195] although a diplomat is not liable to arrest or detention,[196] he or she is bound to "respect the laws" and not to "interfere in the internal affairs of" the receiving state.[197] The receiving state may "at any time and without having to explain its decision" notify the sending state that a diplomat is persona non grata.[198] The sending state is thereupon required to recall the person concerned or terminate her functions.[199]

In fact, the United States government rarely issues formal declarations that a member of a foreign mission is persona non grata. Instead, it usually suggests, informally, to the foreign government concerned that it recall certain members of its mission.[200]

A hard line towards foreign secret police operations will include certain costs. United States intelligence officers abroad are in effect "reverse hostages"; the expulsion of a foreign intelligence officer from this country can lead to the expulsion of a United States intelligence officer from another state.[201] An eye for an eye is widely accepted as the foremost rule of international custom governing treatment of intelligence matters.[202]

But retaliatory expulsions will not persist, and may not commence, if the State Department gives effective notice that the same rules will

targets are the communist nations, especially the Soviet Union and China, and the most sought-after information concerns their military capabilities and intentions." V. MARCHETTI & J. MARKS, THE CIA AND THE CULT OF INTELLIGENCE 79 (1974). *See also* Piper, *American Perception and Misperceptions of Soviet Military Intentions and Capabilities*, in INTELLIGENCE POLICY AND NATIONAL SECURITY 74–81 (R. Pfaltzgraff, Jr., U. Ra'anan & W. Milberg eds. 1981); J. Smith, *supra* note 6, at 126; LaVoy, *supra* note 15, at 62.

195. The Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, *opened for signature* April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. The Convention entered into force for the United States on December 13, 1972.

196. *Id.*, art. 29.

197. *Id.*, art. 41(1).

198. *Id.*, art. 9(1).

199. *Id.*

200. 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 92 (1970).

201. *See supra* note 26.

202. In a typical tit-for-tat, the United States recently barred the posting of an Indian diplomat in retaliation for New Delhi's rejection of an American diplomat accused of CIA connections. *India Denies Soviet Prompted Barring of Diplomat*, N.Y. Times, Sept. 5, 1981, at A9, col. 1.

henceforth apply to all. The argument that a firmer domestic policy would hamper legitimate United States law enforcement efforts abroad[203] overlooks the fact that United States intelligence officers presumably do not transgress accepted norms of diplomatic behavior or violate international law. If they do, they should stop, and if halting such behavior in the United States has the effect of halting it abroad, then so much the better.

2. Statutory Reform

Ideally, the sorts of suggestions outlined above should constitute a charter for the intelligence community, a comprehensive statute setting clear limits upon the foreign and domestic operations of the United States intelligence community.[204] The enactment of an intelligence charter is probably not currently politically feasible, nor is the strengthening of the "Solarz Amendment."[205] Any statutorily mandated step of the sort outlined above, such as a legal requirement that the President declare offending diplomats persona non grata, would face a certain veto and could raise serious constitutional questions. The determination of which foreign emissaries to "receive" lies close to the core of independent Presidential powers. The Reagan Administration has proposed that the State Department "cease issuing visas to . . . foreign students in order to pressure the government concerned to stop those practices."[206] Yet this would penalize the already aggrieved student, not the wrongdoer government.

Given the improbability of enacting legislation which would impose direct governmental sanctions on foreign intelligence services, and given the further improbability of meaningful administrative steps being taken to resolve the problem, it is useful to focus instead upon the possibility of furthering the ability of affected non-governmental organizations to employ the means at their disposal. The colleges and universities attended by students who face systematic harassment, intimidation or surveillance by foreign intelligence services face the

203. *See, e.g.*, the comment of Robert L. Keuch, former Deputy Assistant Attorny General. "We have to tread cautiously," Mr. Kreuch said, "because we ourselves are engaging in activities in other countries, and correctly so. We operate a network of law enforcement and intelligence investigations in foreign countries that involve our citizens. We want to be sure that what we do to prevent the actions of foreign intelligence agencies in this country does not rebound on us and get us kicked out of other countries."
Pear, *Importing Violence Is a Shadow Industry*," N.Y. Times, Aug. 23, 1981 at E4, col. 3.

204. Church Committee Report, Intelligence Activities and the Rights of Americans, Book II, *supra* note 184, at 296–339.

205. *See supra* text accompanying notes 185–88.

206. Letter from Elliot Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs, to Robert F. Coulam, Assistant Professor of Social Science and Public Policy, Mar. 1, 1983 (on file with author).

problem of gathering reliable information sufficient to link particular acts to a particular foreign intelligence agency. In order to sue foreign governments who harass, intimidate, or maintain surveillance of its students, a university needs to identify such governments.

At this stage, involvement by the United States government becomes both desirable and politically feasible. The United States intelligence community is capable of identifying those governments. Indeed, the Executive branch is required by law to report annually to Congress concerning the human rights practices of states receiving military assistance.[207] The annual submission and publication of these reports helps focus attention on continuing human rights violators. The procedure might well serve as a model. If what a government does to its citizens within its own territory is properly a matter of United States concern, what that government does to its citizens within the territory of the United States is a fortiori a matter of United States concern. The best way of getting information about harassment, intimidation or surveillance is to direct the executive branch to enact a country-report requirement mandating annual accounts of improper intelligence activities conducted within the United States. A great amount of detail is not necessary, and given the sensitivity of the sources and methods used to gather the information, a large measure of detail is unattainable. All that is necessary is for the educational community to know which states' secret police forces are active on United States campuses. Colleges and universities could then bring individual or collective pressure against the states in question to halt those activities.

One would hope that such action would ultimately lead to a more thorough examination of questions concerning the role played by the United States government, questions that have thus far received too little attention.

IV. CONCLUSION

A. *"Neutral Principles" and State-Sponsored Terrorism*

The approach suggested in this article to the problem of foreign intelligence activity in the United States consists of perhaps the two most fundamental precepts of the Reagan-Kirkpatrick foreign policy exegesis: the rejection of diplomatic double standards, and opposition to international terrorism. Ambassador Kirkpatrick, prior to assuming her position at the United Nations, called for a "realistic policy which

207. *See* Foreign Assistance Act of 1961, § 116(d)(1), 22 U.S.C. § 2151n (1976); *id.* § 502B(b), 22 U.S.C. § 2304 (1976).

aims at protecting our own interest,"[208] and decried the Carter human rights policy for acceptance of "the status quo in communist nations . . . but not in nations ruled by 'right-wing' dictators or white oligarchies."[209] Promising to eliminate double standards of the sort that pervaded the Carter human rights policy, former Secretary of State Haig announced that efforts to halt international terrorism would replace human rights concerns as the centerpiece of United States foreign policy.[210]

The Reagan Administration's response to Libyan intelligence activities in the United States points the way for effective action within the existing legal framework. Following the shooting of a Libyan student, who was warned by the FBI that he was one of 24 persons on a Libyan "hit list," the FBI arrested a man who, police charged, was a mercenary recruited by the Libyan government.[211] Two weeks after the arrest, the State Department ordered the Libyan Embassy in Washington to close down and expelled all 27 of its diplomats.[212]

The Executive must move with equal alacrity in dealing with the intelligence services of less hostile states. Libyan diplomats should not serve as examples merely because Libya is a weak and rather ineffectual adversary of the United States. If the policy against terrorism is to be more than a drumbeat, it must be applied equally to all. Allowing abuse of United States good will by traditional allies would mean replacing a double standard on human rights with a double standard on terrorism.

It is not enough to apply the same principles only to the conduct of foreign states. These principles must govern the behavior of the United States as well.[213] To condemn terrorism when supported by adversaries of the United States and to condone it when supported by allies of the United States undercuts the most fundamental tenet of the international legal order, the concept of "reciprocally applicable neutral principles."[214] "[S]o long as the United States (or any other nation) is committed to the rule of law rather than the rule of the jungle," Professor Franck has written, "the duty to govern specific

208. Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY 45, Nov. 1979.

209. *Id.* at 41.

210. *See supra* note 4.

211. *Qaddafi Tied To Shooting of Libyan in U.S.*, N.Y. Times, May 24, 1981, § 1, at 1, col. 2.

212. *Id.*

213. As Professor Ullman said of United States human rights policy, "Florence Nightingale's remark about hospitals is once again apposite: 'First, they should not spread disease.'" Remarks of Professor Ullman at the First Symposium of the Allard K. Lowenstein International Human Rights Law Project, Yale Law School (April 16–18, 1982)(on file at Harvard International Law Journal).

214. T. FRANCK, THE STRUCTURE OF IMPARTIALITY 320 (1968).

national conduct in accordance with neutral principles of general application is not one limited to the chambers of the International Court of Justice."[215]

The activities of THRUSH in the United States represent,in one sense, an easy case. Few foreign states are likely to engage the cooperation of the CIA so closely, operate against residents of the United States so intensely, and repress their own citizenry so brutally as to trigger the application of criminal sanctions. THRUSH's operations are usefully reviewed to show where the law draws the line on liaison relationships.

In another sense the hypothetical case of THRUSH and the CIA presents a harder set of questions. Can one set aside any law or constitutional precept for the purpose of advancing a foreign policy imperative for the preservation of the United States? Most would probably say yes, since the Constitution is not, after all, "a suicide pact."[216] But neither is the Constitution a compact of convenience, providing protection for dissidents only when their activities happen to comport with the government's foreign policy objectives or its assessment of the national interest. The survival of the United States as a nation is seldom contingent upon the survival of a given authoritarian regime, and the survival of such a regime is seldom contingent upon its continuation of intelligence operations in the United States. Where such activities go beyond the pale, "the legal order would be better preserved if departures from it were frankly identified as such than if they were anointed with a factitious legality and thereby enabled to serve as constitutional precedents for future action."[217]

B. The Mandate of National Security

Under the best of circumstances it is no easy task to identify what is essential to this nation's security and well-being, and to devise policies based on a balance of diverse, sometimes conflicting, national goals. Governmental support or indifference towards operations in the United States by the secret police of certain foreign states reaffirms one set of vital interests,the support of states that are friendly to United States interests, while altogether discarding another vital interest,the protection of freedom of expression, the Constitution's "most majestic guarantee."[218]

The guarantee of free expression is especially vital to United States foreign policy, for it is an element of the process by which it is made. It is a means of ensuring that our foreign policy reflects the genuine national security interests of the United States. Policy-makers, and those who under our form of government are entitled to affect policy-makers' decisions, must receive relevant information. Justice Brennan opined:

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government . . . . Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open" . . . but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.[219]

The victim of the foreign secret police force is not simply its individual "target" but rather the entire body politic. National security consists of the safety of the individuals composing the state. In the United States, the law places the individual before the state; its guarantees of individual liberty, particularly free expression, are not viewed as simply another set of values to balance against others in pursuit of national security. One cannot properly weigh the "good of the state" against the good of any individual, for the scales almost invariably tilt toward the collective entity. The interest of one individual versus another individual, or of one state interest versus another state interest, are properly comparable.

But these truths are quickly forgotten against a backdrop of geopolitical games where, on boards in policymakers' minds, one anthropomorphic state befriends another, betrays another, or bedevils another. The point is too easily lost that the "state" is no more than a mental construct, an aggregate of individual interests, and that United States foreign policy is conducted for the purpose of preserving the primacy of the individual over the state.[220] To foresake that priority

215. *Id.* at 328.
216. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).
217. A. SCHLESINGER, THE IMPERIAL PRESIDENCY 9 (1973).
218. L. TRIBE, *supra* note 179, at 576.

219. Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring).
220. As the Supreme Court said in United States v. Robel, 389 U.S. 258 (1967):
> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart . . . . It would be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—freedom of association—which makes the defense of the Nation worthwhile.

Id. at 264.

is to forsake the ultimate morality to which this nation can lay claim.

The question is whether the processes of gathering intelligence, conducting liaison arrangements, pursuing improved bilateral relationships, all intended to strengthen its national security, will subordinate, or be subordinated to, the processes provided by the Constitution to protect the individual from the state. The question is "whether, in defending our institutions, we sacrifice the values which make the defense worthwhile . . . . [T]here ought to be no real conflict between national security and human rights. An open and flourishing society is likely to be more secure in preserving its institutions than a closed and repressive one. At least that is our faith."[221]

It is not only our faith; it is, under our Constitution, our right, and we can demand no less.

221 Remarks by Professor Emerson at the First Symposium of the Allard K. Lowenstein [illegible] Law School (April 10, 1982).